No. 406

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, PETITIONER

v.

HAROLD S. KNOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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HARRY S. KNIGHT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court denying motions in arrest of judgment and for a new trial (R. 809-826) is not reported. The majority (R. 829-836) and dissenting (R. 836-838) opinions in the Court of Appeals are reported at 169 F. 2d 1001.

JURISDICTION

The judgment of the Court of Appeals was entered August 13, 1948 (R. 839), and a petition for

rehearing was denied October 13, 1948 (R. 840). The petition for a writ of certiorari was filed November 10, 1948, and was granted January 3, 1949 (R. 870). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

The trustee of a bankrupt estate, pursuant to what purported to be a plan of reorganization, transferred the entire assets of the estate to another company in exchange for a previously agreed upon cash consideration. By secret agreement with the attorneys and representatives of the transferee company, $3,000 of the consideration was paid through an intermediary to the trustee for his own personal use, the intermediary retaining $500 of the money for the purpose of paying his income tax on it. The question presented is whether the trustee, by accepting this money for his own use and not accounting for it to the court as part of the consideration for the transfer, fraudulently appropriated to his own use property belonging to the estate of a bankrupt, within the meaning of Section 29(a) of the Bankruptcy Act.

STATUTE INVOLVED

Section 29(a) of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 554, as amended (11 U.S.C. 52(a)), provides:

> A person shall be punished by imprisonment for a period of not to exceed five years or by a

fine of not more than $5,000, or both, upon conviction of the offense of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to the estate of a bankrupt which came into his charge as trustee, receiver, custodian, marshal, or other officer of the court.

STATEMENT

The first two counts of a 3-count indictment (R. 7-15) filed in the District Court for the Middle District of Pennsylvania charged one Robert Michael, trustee of the bankrupt estate of the Central Forging Company, with fraudulently appropriating $3,000 of the estate to his own use (count 1) and unlawfully transferring $3,000 of accounts receivable of the estate (count 2), in violation of Section 29(a) of the Bankruptcy Act, as amended, *supra*. Respondent Harry S. Knight and three other defendants, George Fenner, Homer Davis, and Donald Johnson, were charged in both counts as aiders and abettors of Michael. Count 3 charged all five of the above-named defendants with conspiring to commit the offenses described in the first two counts, in violation of Section 37 of the Criminal Code (now 18 U.S.C. 371). One Donald Reifsnyder was named as a "confederate" in all three counts, but not as a defendant, having died before the indictment's return (R. 415).

Michael pleaded guilty (R. 26), and became the Government's chief witness. Following a trial by jury, respondent Knight and Fenner were convicted on all counts, and Davis and John-

son were acquitted (R. 808). Respondent was sentenced generally to pay a fine of $1,000 (R. 827). On appeal by respondent alone, the Court of Appeals, one judge dissenting (R. 836-838), reversed his conviction on all counts and directed entry of a judgment of acquittal (R. 839).

Evidence for the prosecution. The evidence adduced by the Government may be summarized as follows:[1]

1. Robert Michael, the defendant who pleaded guilty and became the principal prosecution witness, testified that in the year 1941 he was the manager of the Scranton Country Club, a position he had held since 1935 (R. 27). He first learned of the existence of the Central Forging Company of Catawissa, Pennsylvania, in late November or early December of 1941, when one of his social acquaintances, the defendant Donald Johnson, mentioned to him at the club or on the street that Walter Compton, the trustee in bankruptcy of that company, which had been for some years the subject of a reorganization proceeding in the District Court for the Middle District of Pennsylvania, was about to resign as trustee, and that "it would be necessary for a new trustee to be appointed" (R. 27-29). Johnson suggested to Michael that "it might be something that [Michael] would be interested in." Michael expressed interest, and John-

[1] We set this evidence forth at some length because the Court of Appeals, in our view, erroneously failed to accord the proper weight to the Government's evidence.

son advised him to "contact" Johnson's father, Albert W. Johnson, who was at that time a District Judge of the United States District Court for the Middle District of Pennsylvania. (R. 30.) Michael, accordingly, got in touch with Judge Johnson, and, following a conference with him, went to Catawissa "to look over the Central Forging Company." At the plant, he talked with Fred Long, Sr., Max Long, and the defendant Homer Davis, who "were operating [the plant] at the time" on behalf of the then trustee, Compton. (R. 30-31.) Michael then returned to Scranton and advised Judge Johnson that he "would like to be appointed trustee and was interested." Thereafter, on December 27, 1941, Judge Johnson appointed Michael successor trustee *vice* Compton, effective as of January 1, 1942. (R. 31.)

Shortly thereafter, Donald Johnson again saw Michael and "the matter of appointing an attorney for the trustee was discussed" (R. 32). Johnson "suggested * * * that [Michael] appoint Donald Reifsnyder due to the fact that he had had considerable bankruptcy experience and * * * would make a very fine lawyer for the trustee" (R. 33). Reifsnyder was the alleged "confederate" named in the indictment (*supra*, p. 3). Accordingly, pursuant to Johnson's suggestion, Michael approached Reifsnyder and "asked him if he would like to serve as * * * my counsel." Reifsnyder "stated that he would." (R. 33-34.) Reifsnyder

drew up a "Petition for Appointment of Attorney for the Successor Trustee," asking his appointment to that position, and Michael signed it (R. 34). Judge Johnson granted the petition in an order bearing the date January 24, 1942, but "filed" five days earlier, January 19th (R. 35). Though Reifsnyder was not "officially appointed" until the filing of this order, he had "started to advise [Michael] as an attorney" prior thereto, commencing at or shortly after the time that Michael "took over the property" (R. 36).

The Maxi Manufacturing Company, also located in Catawissa, manufactured the same products as the Central Forging Company—"fittings, unions, steel unions and valves" (R. 40-41). The Maxi Company was operated and largely owned by Fred and Max Long; they "[were] the Maxi Manufacturing Company for all practical purposes" (R. 40, 697). The Maxi Company was a substantial secured creditor of the Central Forging Company (R. 696-697), and, at the time of Michael's appointment as successor trustee, the Central Forging Company was being operated by the Longs (R. 40, 697; *supra*, p. 5). The defendant Homer Davis was the treasurer of the Maxi Company (R. 48), the defendant George Fenner was its general counsel as well as having a substantial interest in the company (R. 579), and respondent Harry S. Knight was a special attorney engaged by the Maxi Company in connection with its interests in the Central Forging Company (R. 39, 395-396).

2. During the month of January 1942, prior to January 23, Michael and Reifsnyder, in their capacities as trustee and attorney for the trustee of the Central Forging Company, "discussed at some length" with the Longs "the proper solution of the difficulties of the Central Forging Company," particularly "the proposition of merging the two companies [*i.e.*, Maxi and Central]" (R. 38). The Longs were interested in the idea and suggested that Michael and Reifsnyder discuss the matter with Maxi's special counsel, respondent (R. 39). Accordingly, on January 23, 1942, Michael and Reifsnyder had their first of "many conferences with Mr. Knight" (R. 38). They "were there a considerable time, I would say we were there probably two to four hours and we listened to Mr. Knight considerably as he outlined what had taken place in the proceedings before, the other legal entanglements which the [Central Forging] company had been in." Respondent "went into Mr. Compton—Mr. Compton, the previous trustee, had proposed a plan which had been defeated by the bondholders, or the creditors. He had a copy of that plan, as I remember, and we went over it. In other words, we went over the background, first, and we were informed as to what had happened and then we started to discuss elements of the new plan." (R. 39.) At the end of the meeting, respondent told Michael and Reifsnyder that "he saw no reason why a plan could not be worked out and that upon consultation with his client, namely, the Longs,

that he would draft a formal proposal, that is, somewhat of a formal proposal, which he would mail to us" (R. 40).

On January 29, 1942, respondent wrote a letter to Michael and Reifsnyder in which he submitted a written proposal on behalf of the Maxi Company (R. 41; Ex. G-2-A, R. 696-700). Under the terms of this proposal, the Maxi Company would "pay to you in cash the sum of $17,000 for a clear and unencumbered title to the land, plant, machinery and equipment and all assets of every kind and character [of the Central Forging Company] except accounts receivable, cash, goods in process, goods finished, and raw materials, and will waive its [Maxi Company's] claim to participate in the bonds of the Central Forging Company now held by the Maxi Company, aggregating $21,300" (R. 696-697). The $17,000 was to be used, according to the proposal, to pay secured creditors of Central (other than Maxi) 20% of their claims, and unsecured creditors between 5% and 8% of their claims (R. 697-698), and the expenses of the reorganization were to be paid from the proceeds realized from liquidation of the Central Company's "net current" assets, *i.e.*, current assets less current liabilities (R. 698-699). The letter containing the proposal included a rough balance sheet of the Central Forging Company, reflecting its financial position as of January 1, 1942, which the defendant Davis (treasurer of Maxi) had furnished re-

spondent from his "work sheets," the final "audit" as of that date not having been completed (R. 698). This rough balance sheet listed and itemized the "current assets," the "current liabilities," and the resulting "net current position January 1, 1942" (*ibid.*). Respondent's letter stated that "I am informed [by Mr. Davis], also, that while this [financial] statement is of January 1st, 1942, that there would be no material difference in the current position from month to month over a period of a few months—that is, there might be in the next month less inventory but it would reflect itself in greater receivables; and the receivables might become less, which would reflect itself in the cash, and cash used to pay the payables, so that the net would remain about the same" (R. 698-699). The Maxi proposal also contained various other details, which it is not necessary to state. This proposal, Michael testified, was "the basis of the plan that eventually was put through,"—"the starting point" (R. 42).

On February 13, 1942, Michael and Reifsnyder went to respondent's office in Sunbury, Pennsylvania, where the three "talked over this plan" and "worked the plan around in a little different form, not much, but got it fairly well set," following which Michael and Reifsnyder drove to Harrisburg, where they "had made an appointment to meet with the Bondholders' Committee [of the Central Forging Company], which had been set up and had been in existence for some time" (R.

50-51). At Harrisburg, they met several members of the Bondholders' Committee, and "discussed the acceptance by them" of the plan of reorganization which the Maxi Company had submitted (R. 51). The bondholders "signified their willingness to go along on the plan of merger and * * * turn their bonds in" (R. 56).

3. Shortly after midnight of the same day, February 13, Michael and Reifsnyder started to drive back from Harrisburg to Scranton (R. 51). They "had largely accomplished what we had set out to do and it looked like, at that time, that merger would go through. There was nothing at that time to stop it" (R. 57). On the way back to Scranton, "Mr. Reifsnyder said [to Michael], 'Well, I suppose we have to talk about some way in which we have to take care of Donald Johnson.' And I said, 'What do you mean, splitting of fees?' And he said, 'Well, I am not sure whether we have to do that or not. I have in mind another plan which would create a fund aside from the moneys which would be paid over, of course, in the form of allowances by the Court,' and he said, 'We could set up certain funds which would be paid over to a third party and then come back for disbursement to Mr. Johnson' " (R. 57). Michael asked, "Well, what do you think, will other people go along on it, after all, you are going to have to take other people in on it" (R. 57), to which Reifsnyder replied that "he had discussed it with Mr. Knight in

his office that morning and that he was agreeable to going along on some proposition" (R. 58). A few days later, on February 19, 1942, Michael called Donald Johnson on the telephone and "asked him, in reference to this conversation with Mr. Reifsnyder, if he was aware of the plan," to which Johnson replied that "he was, he was agreeable to it and he thought that that's the way it should be done" (R. 59).

4. On February 17, 1942, Reifsnyder wrote respondent a letter (Ex. D-K-10, R. 715-718) enclosing "the revised plan of reorganization for your consideration and suggestions" (R. 715). Under this proposed revision, the Maxi Company was to pay to the Central Forging Company, in addition to the $17,000 previously agreed upon as the consideration for Central's fixed assets (see p. 8, *supra*), the value of Central's entire net current assets,[2] or a total (*i.e.*, including the $17,000) of $43,000-odd (R. 716).[3] In computing

[2] In computing the value of the net current assets, the current assets—cash on hand and in the bank, finished products, parts in process, raw materials, unexpired insurance premiums, cash value of life insurance, advances to salesmen, and "accounts receivable assigned and unassigned" (all these items being "as of 12/31/41")—were totaled, and from that total the current liabilities—accrued wages and salaries, compensation insurance, pay roll tax, and notes and accounts payable (these items being also "as of 12/31/41")—were deducted (R. 716).

[3] Thus, under Reifsnyder's proposed revision of the Maxi Company's original proposal, the Maxi Company would take title to Central's entire assets, current as well as fixed, whereas under the original proposal Maxi was to take title only to

the value of the net current assets (see footnote 2), the accounts receivable were evaluated at $23,534.50,[4] which was their book value as of the audit date, December 31, 1941 (R. 716).[5]

On February 23, 1942, respondent wrote Reifsnyder a letter (Ex. D-K-13, R. 719-724) in which he submitted a re-draft of the plan as outlined in the preceding paragraph, modifying it in minor particulars, but accepting the basic idea that the Maxi Company would pay for, and take title to, Central's entire current assets as well as its fixed assets (see, particularly, R. 722-723).

On February 27, 1942 (R. 61, 67), Michael and Reifsnyder filed in the District Court their "Proposal of a Revised Plan of Reorganization" (Ex. G-1-D, R. 704-708). According to the proposal, "All of the assets, claims, patents, rights, fran-

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Central's fixed assets—"land, plant, machinery and equipment and all assets * * * except accounts receivable, cash, goods in process, goods finished, and raw materials" (*supra*, p. 8).

[4] This figure is one of particular significance which has a most important relation to the case.

[5] It was recognized by every one concerned, of course, that the value of the accounts receivable had changed and would keep changing to some extent before consummation of the plan of reorganization, but this factor was not considered important, since fluctuations in the value of the accounts receivable would be accompanied by compensating fluctuations in cash, inventory, payables, etc., so that Central's net current position would remain sufficiently steady over a period of a few months to permit of ignoring the fluctuations for the purposes of the plan of reorganization. See respondent's letter to Michael and Reifsnyder, containing Maxi's original proposal, quoted in pertinent part at p. 9, *supra*.

chises, cash, receivables, and property of every kind, nature and description" of the Central Forging Company were to be transferred free and clear of all encumbrances to the Maxi Company (R. 706); stockholders of Central were to receive nothing and their stock certificates were to be canceled, in view of "the adjudicated insolvency of the Debtor" (R. 705); secured creditors of Central were to receive 20%, and unsecured creditors 5%, of their respective claims in "general debenture bonds of the Maxi Manufacturing Company, bearing interest at 5% per annum, to commence one month after the date of issue, and to be callable at any time after issue, at par and accrued interest" (R. 706-707);[6] and all "Fees and Expenses of Receivership in the Equity Court of Columbia County, Pennsylvania,[7] as allowed and approved by the United States District Court for the Middle District of Pennsylvania" and "All Taxes, Costs and Expenses of Reorganization and Administration as allowed by the United States [District] Court for the Middle District of Pennsylvania, as well as all expenses of consummating this plan of reorganization" "shall be paid in full in cash by the Trustee aforesaid upon acceptance of the plan according to law" (R. 707-708).

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[6] The $17,000 which Maxi was to pay for Central's fixed assets was to be used to redeem these debenture bonds (R. 68, 73, 685, 702-703, 721).

[7] This has reference to a state receivership proceeding involving the Central Forging Company, which preceded the federal proceeding (cf. Ex. G-1-H at R. 691).

On March 16, 1942, Judge Johnson entered an opinion and order (Ex. G-1-E, R. 709-713) approving the foregoing plan of reorganization as "fair, equitable and feasible", and directing that it "be submitted to all creditors and parties in interest pursuant to the provisions of Chapter X of the Bankruptcy Act of 1938" (R. 709, 710, 711). "Exhibit 'A'" to this order, consisting of Judge Johnson's "Summary of Revised Plan of Reorganization" (R. 712), briefly summarized the details of the plan thus approved, and ended with the statement that "Administration costs and expenses and Columbia County Equity Court costs and fees are to be paid hereunder."

5. Though the trustee's "Proposal of a Revised Plan of Reorganization" had been submitted to the court on February 27, 1942, and had been approved by Judge Johnson on March 16, 1942 (*supra*, pp. 12-14), Michael and Reifsnyder had not as yet reached any "definite agreement" with respondent "as to the exact amount of cash that was to be paid by the Maxi Manufacturing Company in addition to the $17,000 which was to go, eventually, to the bondholders and unsecured creditors"—*i.e.*, as to the exact amount of cash which the Maxi Company was to pay for Central's net current assets (R. 68, 71). This figure was not agreed upon until April 8, 1942, when Michael and Reifsnyder met in respondent's office and "the final amount was determined that was to be paid over" (R. 71). On this

occasion, "$25,982 [and] some odd cents" was agreed upon as "the amount which was ultimately to be paid in cash in addition to the $17,000" (R. 71, 72). More exactly, the figure agreed upon was $25,982.83 (R. 703).[8] The latter figure, however, represented a net amount remaining after crediting the Maxi Company with $421.50 for an item of expense (payment of "some bond premiums for the previous trustee") which had previously been paid by Maxi on Central's behalf (R. 71, 95, 686, 703), so that the total amount agreed upon as to be paid by the Maxi Company for Central's net current assets—*i.e.*, including this item of prepaid expense—was $26,404.33.[9]

It was also agreed at this meeting of April 8, 1942, that the amount of money which "was to come back to us [*i.e.*, to Michael and Reifsnyder, R. 76]" would be $3,000 (R. 74), and that, inasmuch as the "accounts receivable" of the Central Forging Company were "subject to not being collected in full," that item "would be a logical place [from

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[8] This conference of April 8, Michael testified, "lasted, I would say, some two or three hours. We got there in the middle of the afternoon. As I say, we came to a final figure on the amount that Maxi Manufacturing Company was actually owing to the Central Forging Company.

"Q. You mean the amount they were to pay in cash at the closing?

"A. That's correct. That was the purpose of that meeting and that was accomplished there." (R. 73.)

[9] This figure is another one of particular significance, in addition to the figure of $23,534.50, at which the accounts receivable of Central were initially evaluated (see footnote 4, *supra*, p. 12).

which] to take [the] $3,000 off" (R. 80). Accordingly, it was decided that the amount which the Maxi Company would pay to the trustee for distribution under orders of the court (over and above the $17,000 which was to be used to pay Central's creditors by redeeming the debenture bonds of Maxi that were to be issued to them) would be $22,982.83, or exactly $3,000 less than the $25,982.83 [10] which had been agreed upon as the amount Maxi was to pay for Central's net current assets (R. 82-83).

At a second conference on this date, April 8, 1942,—between Reifsnyder and respondent at the latter's home that evening—it was decided that the "$3,000 would be made payable to a third party," who, under the secret plan, would keep for himself a sufficient amount with which to pay his income tax on the whole $3,000 and turn the balance over to Michael and Reifsnyder, and it was "tentatively agreed that Mr. George Fenner, Sr., would be approached for the purpose of receiving the $3,000, which he in turn would turn back to us" (R. 74, 75). Reifsnyder and respondent "tentatively agreed," Michael testified, "providing Mr.

[10] As indicated in the preceding paragraph, this figure omitted from consideration the $421.50 expense item previously paid by Maxi on Central's behalf. It should be mentioned that Michael, in referring to the amount $25,982.83 in his testimony, usually omitted the cents, and also, occasionally, inadvertently reversed the figures "9" and "8," saying "$25,892" (R. 71, 72, 82, 83).

Fenner was willing, that Mr. George Fenner, Sr. would be the logical man to receive the check for $3,000 due to his connection as attorney for the Maxi Manufacturing Company" (R. 77). The amount which Fenner was to retain from the $3,000 for tax purposes, however, was "left sort of an open question" at this time, owing to uncertainty as to what the tax would be (R. 78). It was also agreed between Reifsnyder and respondent at this evening conference that Reifsnyder would write respondent a letter, in which he would agree, on behalf of Central, to receive in exchange for Central's accounts receivable $3,000 less than they were valued at on the company's books, the purpose of the letter being "to cover up, for the purposes of the record, any question as to why $3,000 less was paid than was shown by the books" (R. 84).[11]

6. The foregoing testimony of Michael was fully corroborated by two letters which the Government introduced in evidence as Exhibits G-2-B (R. 700-702) and G-2-C (R. 702-704).

Exhibit G-2-B is an unsigned letter, admittedly (R. 475) written by respondent to the defendant Homer Davis (treasurer of Maxi), and dated April 9, 1942, the day following the two conferences with Michael and Reifsnyder to which reference has just been made. In it respondent said (R. 700-702):

[11] This proposed letter was written as planned (Ex. G-2-C, R. 702-704), and is quoted in full at pp. 20-21, *infra*.

DEAR HOMER:

* * * * *

Last evening about 8 o'clock Don Reifsnyder called at my home. He said that he and Mr. Michaels had had dinner in Sunbury, had talked over in detail the problem which we discussed here for an hour or two about getting the extra money, and made a suggestion that it be paid to a lawyer whom he designated who would render a bill to the Maxi Company, namely, that the Maxi Company now pay to the Trustee $22,982 being $3,000 less than the amount we calculated and then later on pay the $3,000 to a lawyer to be designated by Don who would render a bill and they would arrange then to get this $3,000.

I was not impressed with carrying out this purpose through a stranger who had no occasion to do business for your plant, and knew none of you, never had been at the plant and never saw any of the parties. I suggested to Don that we would endeavor to protect him and that personally I would like to see it done through Mr. Fenner or young George Fenner; that in any event he would be perfectly justified in giving us a reduction of 15% on the receivables, especially in light of the fact that we were required to place at least one account, and probably more, in the hands of an attorney, and even if we collect it, it would cost us the 15% collection fees. 15% of the receivables taken over January 1 amounts to about $3500.00. It was then arranged that he

would write me a letter stating that they could not agree to the deduction of 15% which would amount to about $3500 but they would agree to a flat deduction of $3000 and make the price $22,982.00 plus some odd cents, and that we would endeavor to make some arrangements through Mr. Fenner to work out a plan satisfactory.

I told him I could not talk to Fenner between now and the 17th because I was leaving today and would not be back until the night of the 15th at least.

If you feel that you can explain this to Mr. Fenner I would be very glad to have you take it up with him, and I will explain it more in detail when I get back, and am able to see him. If you feel it would be better for me to take it up in the first instance, you can let it go until I return.

Very truly yours,

Exhibit G-2-C is the letter, also dated April 9, 1942, which Reifsnyder wrote to respondent, consenting to take $3,000 less for Central's accounts receivable than their book value, in order "to cover up," as Michael put it, "for the purposes of the record, any question as to why $3,000 less was paid than was shown by the books" (*supra*, p. 17; R. 86; see also the second paragraph of the letter from respondent to Homer Davis, quoted in the preceding paragraph). It reads as follows (R. 702-704):

DEAR MR. KNIGHT:

To confirm our discussion in your office yesterday, I hereby give you the Trustee's answer to the question raised.

According to our original understanding, the Maxie Company was to take over the assets of the Central Forging Company for a total of $43,754.33 less certain deductions. From this amount there is an immediate deduction of $17,000.00 which is utilized exclusively for the payment of 20% to bondholders and 5% to unsecured creditors, leaving a balance of $26,754.33. From this is deducted $421.50, being the expenditures set forth in your letter of February 26th to me. [See *supra*, p. 15.] This leaves $26,332.83. From this amount there is another proper deduction of $350.00 being the bookkeeping figure of Salemen's advances which are uncollectible by either the Maxie Company, the Trustee, or anyone else. This leaves $25,983.83 [*sic*: should read $25,982.83] and includes the amount to be paid by Maxie for everything including the accounts receivable.

Mr. Michael and I have gone over the history which you exhibit in connection with your attempts to collect these accounts receivable. It is perfectly clear that you will not collect all of them and the question that we tried to thrash out was what amount should be deducted from the figure last named to reflect the amount that you will not be able to collect.

The total amount of the accounts receivable is $23,534.50. It seems that we could debate this question for a long time and not come

to any agreement. Your request to be allowed 20% seems to Mr. Michael and me to be too much, as that would amount to more than $4600.00. I have checked into other cases and note that 20% has been allowed for shrinkage in accounts receivable, but we don't feel that full amount should be allowed.

To compromise the situation, I suggest that a flat allowance of $3,000.00 is proper. Consequently we deducted $3,000.00 from the figure of $25,982.83, leaving the amount to be turned over to the Trustee for Administration expenses at $22,982.83. It is, of course, my understanding that the $17,000.00 for creditors claims is in the hands of Mr. Uganst the Escrow Agent.

I shall assume that this arrangement is satisfactory in accordance with my understanding with you at your home last evening.

Yours very truly,

(Signed) Don Reifsnyder.

7. On April 15, 1942 [12] (see R. 695-696), Michael, through this attorney, Reifsnyder, filed with the court a "Report of Successor Trustee" (Ex. G-1-F, R. 685-687), in which he stated that (R. 685):

> Prior to the time for hearing on the confirmation of the revised plan of reorganization, as approved by the vote of the requisite number of creditors, and prior to the application for fees and allowances by the various parties in interest, the successor trustee hereby submits a report of the assets to be acquired in the reorganization as an aid to the Court.

[12] The report was dated April 14, 1942 (R. 87, 90).

The report listed the Central Forging Company's "adjusted" accounts receivable at "$20,534.50," and the "Balance" remaining after Central's total liabilities had been deducted from its total assets, at "$23,404.33" (R. 686). Michael testified at the trial that both these figures were false (each being $3,000 less than the truthful figure), the variance being due to "the $3,000 which was diverted," *i.e.*, "the $3,000 which was to be paid to a third party by the Maxi Manufacturing Company for the purpose of coming back to Donald Reifsnyder and myself" (R. 93-95). The truthful figures, he stated, would have been $23,534.50 and $26,404.33, respectively (R. 94-95).

On April 17, 1942, Judge Johnson filed an "Order of Confirmation of Revised Plan of Reorganization" (Ex. G-1-G, R. 687-690). This order stated that, a hearing having been held on the application for confirmation of the revised plan of reorganization, after "proper notice by the Special Master, to all parties in interest, and pursuant to the order of this Court," "it appeared from the report of the Special Master that more than the requisite 66-2/3% of all claimants of all classes voted in writing to accept the plan," and that "in fact, only two bondholders owning $3500.00 in bonds dissented in all the classes made up of $97,500.00 in bonds and $38,830.58 in general claims" (R. 687). The order further recited that "The affidavit of the Trustee was received in

evidence to the effect that the proposal of the plan and its acceptance were in good faith and were not made or procured by any means of promises forbidden by the [Bankruptcy] Act [of 1938]"; that "it [appeared] that the requirements of the Bankruptcy Act [had] been complied with faithfully and fully;" and that "it [appeared] that the plan is fair, equitable and feasible" (R. 687-688). The order then directed the trustee to convey all the assets of the Central Forging Company "of every kind, nature and description" to the Maxi Company "upon receipt by the Trustee of the said debenture bonds of the Maxi Manufacturing Company [to be distributed to creditors of Central in satisfaction of their claims on the percentage basis previously described], *and upon the payment of all administration costs and expenses as* [*may be hereafter*] *allowed by this Court, within the limits of the funds as set forth in the Trustee's report filed April 15, 1942* [*supra,* pp. 21-22]" [italics added] (R. 689). The order further directed cancellation of all stock and the original bonds of the Central Forging Company (R. 689-690), and concluded with the provision that "The Trustee is authorized to apply to this Court for such additional orders or relief as shall be found to be necessary in aid of consummating this revised plan of reorganization approved and confirmed herein" (R. 690).

Three days later, on April 20, 1942, Judge Johnson filed an "Order on Fees and Allowances Requested in Confirmation of Revised Plan of Reorganization" (Ex. G-1-H, R. 690-696). This order stated that "Pursuant to due and proper notice, the requests by the various parties in interest for fees and allowances came on to be heard in open court on April 17, 1942 * * *. The Court has considered the written requests filed with the Clerk of the Court by each interested party. Arguments in favor of each allowance and objections thereto were heard * * *" (R. 690-691). The order then proceeded to consider and discuss at some length the claims of each of a large number of claimants in the Central Forging Company reorganization proceeding, and directed payment of a certain amount of money to each.[13] The total amount of the claims ordered paid was $23,404.33 (see footnote 13), which was the exact amount of the "Balance" which Michael testified he falsely reported to the court in his report of April 15,

[13] The claimants whose claims were approved in this order, and the amount in each instance, were as follows: the members of the Central Forging Company Bondholders' Protective Committee, $2,300 (R. 691); their attorney, Wickersham, $2,000 (R. 691); respondent, $5,789.45 (R. 692); special master Crolly, $350 (R. 692-693); special master Schwartz, $50 (R. 693); Michael's predecessor as trustee, Compton, $952.53 (R. 694); Compton's attorney, Groover, $400 (R. 693-694); Michael, $3,950 in fees and $1,166.55 as reimbursement for expenses (R. 694-695); Reifsnyder, $3,950 (R. 695); and other persons, named in a previous order of the court, whose claims arose from the state receivership proceeding in the Columbia County Equity Court, which preceded the federal proceeding, $2,495.80 (R. 691). Total, $23,404.33.

1942 (*supra*, pp. 21-22). Judge Johnson's order concluded with the statement that "This fully exhausts the funds of $23,404.33 available for fees, allowances and expenses as itemized in the report of the Trustee filed April 15, 1942. * * *" (R. 695-696).

8. Following the entry of this order on fees and allowances, nothing further remained to be done, Michael testified, "excepting the closing of the whole transaction" (R. 97). This was done at a conference in respondent's office in Sunbury on April 24, 1942, and consisted of the trustee's conveyance of the entire assets of the Central Forging Company to the Maxi Company, the issuance of Maxi bonds for delivery to creditors of Central on the percentage basis fixed by the plan, and the issuance by the Maxi Company of several checks, shortly to be described (R. 97, 99-100). Present at this final conference were Michael, Reifsnyder, Fenner, Davis, Max Long, and respondent (R. 99). Fenner had previously consented to "act as the intermediary in the receiving of the $3,000," and Michael and Reifsnyder, who drove Fenner to this final conference in respondent's office, discussed with Fenner, in the course of the drive, the subject of how much of the $3,000 Fenner should "retain * * * for his income tax" (R. 99). The "substance of [the conversation] was how much [Fenner] felt he should have for the payment of tax on $3,000 additional income which he

was supposed to receive and declare as part of his income. This was finally settled at the figure of $500" (R. 99). The $17,000 in cash which Maxi was paying for Central's fixed assets, and which was to be used, according to the reorganization plan, to pay Central's creditors by redeeming the Maxi bonds that were to be issued to them, had previously been placed in escrow with one Unangst, the cashier of the Catawissa National Bank (R. 18, 478-479, 688, 703-704).

At this final conference of April 24, 1942, the Maxi Company, through its secretary-treasurer, Davis, issued five [14] checks, as follows:

(1) a check to the order of respondent, in the amount of $5,789.45 (Ex. G-3-D, R. 684), which was the amount directed to be paid to him by Judge Johnson's order allowing fees (R. 102-103, 692: see footnote 13, *supra*, p. 24);

(2) a check to the order of Unangst, in the amount of $225 (Ex. G-5, R. 682), for his services as escrow agent in connection with the $17,000 that had been set aside for the redemption of the Maxi bonds that were being issued to creditors of Central (R. 19, 104; see pp. 8, 13, 21, 26, *supra*);

(3) a check to the order of "Robt. D. Michael," in the amount of $8,420.05 (Ex. G-3-A, R. 682),

[14] A sixth check, in the amount of $2,000, drawn to respondent's order (Ex. G-3-E, R. 684), was also issued at this time, but it had no connection whatever with the reorganization proceeding (R. 103, 481, 488, 501).

representing his and Reifsnyder's combined fees and reimbursements as allowed by Judge Johnson (R. 103);[15]

(4) a check to the order of "Robt. D. Michael, Trustee," in the amount of $8,548.33 (Ex. G-3-C, R. 683), representing the sum-total of all the fees and allowances enumerated in Judge Johnson's order other than those for which specific checks were drawn at this meeting (R. 102; see footnote 13, *supra*, p. 24);[16] and

(5) a check to the order of Fenner, in the amount of $3,000 (Ex. G-3-B, R. 683).

The total of these five checks was $25,982.83. Michael testified that the five checks, "in the aggregate," represented "the total amount of the money

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[15] It will be observed that Michael's and Reifsnyder's combined fees and expenses, as allowed by Judge Johnson's order, actually totaled $9,066.55 (R. 694-695; see footnote 13, *supra*, p. 24). The figure $8,420.05 evidently resulted from deducting from the total figure the following two items: (1) the $225 paid to Unangst as an escrow fee (see p. 26, *supra*), this being in the nature of an expense of Michael's that was taken care of by a special check, and (2) the $421.50 item of prepaid expense, to which we have previously referred (see p. 15, *supra*).

[16] *I.e.*, $23,404.33 (total fees and allowances allowed by Judge Johnson's order), minus $14,856.00 (the total of checks (1), (2), and (3), as described in the text, *supra*, plus the $421.50 item of prepaid expense).

Referring to this check for $8,548.33 drawn to his order as "trustee," Michael explained that "That was to cover all of the allowances in that court order other than the ones where there were specific checks drawn that day. In other words, out of this $8,548 I was to pay, and did pay, various accounts * * * This represents the only check and the only amount of money that I handled as a trustee" (R. 102).

paid by the Maxi Manufacturing Company for the personal property and loose assets, or current assets, for everything over and above the [$17,000 that was paid for the] real estate" (R. 104).[17] Michael further testified that, according to his and Reifsnyder's secret agreement with respondent, the $3,000 check to Fenner was "to be cashed by [Fenner] and the proceeds, less $500, turned over to Mr. Reifsnyder and myself" (R. 103).

Michael testified that at the time of the issuance of the above-described checks he was not a little confused as to why five checks were issued rather than two. He could see no necessity for issuing more than two checks—one to be made out to him in his capacity as trustee, covering all the fees and allowances enumerated in Judge Johnson's order, the proceeds of which he, Michael, would use for paying the various fees and allowances in his capacity as trustee; and the other, in the amount of $3,000, to be made out to Fenner pursuant to the

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[17] It will be recalled that Michael previously testified that $25,982.83 was the amount which, as finally agreed upon at his and Reifsnyder's conference with respondent on April 8, 1942, "was ultimately to be paid in cash [by the Maxi Company] in addition to the $17,000" (*supra*, pp. 14-15).

If $421.50 (the amount of prepaid expense referred to at p. 15, *supra*, and see footnote 15, *supra*, p. 27) is added to this $25,982.83 total, the figure $26,404.33 results. The latter figure, is the amount which Michael testified he should, if he had been truthful, have reported to the court in his April 15 report as the "balance * * * available to the court for allowances" (*supra*, p. 22; R. 95), and is exactly $3,000 more than the total amount which Judge Johnson directed to be paid as fees and allowances (*supra*, pp. 24-25).

secret arrangement with respondent, the proceeds of which, less $500, Fenner was to turn back to him (Michael) and Reifsnyder (R. 101-102). Michael explained his perplexity in regard to the matter as follows (R. 101-102):

> Q. Who directed the amount of these checks? Who directed Mr. Davis in drawing the checks, do you know?
>
> A. Well, it was my understanding, or at least I assumed that when it was paid over it would be paid over in one check to Robert Michael, trustee, but Mr. Knight had the idea that it should be paid over in several checks, it wasn't necessary to pay it all in one check. And Mr. Reifsnyder disagreed with that procedure and there was considerable discussion as to whether it was proper or not that the Maxi Manufacturing Company should pay certain fees directly, namely, of course, Mr. Knight's fee, whether the $225 check to Mr. Unangst, the escrow agent, should be drawn directly and whether I, as the trustee, should be recompensed in the form of two other checks. It was over my head, the legal end of it, I couldn't see why it should be done that way or if they wanted it done that way, why shouldn't it be done. But anyway there was a discussion, and finally Mr. Reifsnyder said in his opinion it would be all right.
>
> Q. Now, you said it was your understanding at first that it should be paid in one check.
>
> A. Well, that was my impression, that as trustee that the check should come to me and

that I would make disbursements in accordance with orders of the court.

Q. That would include the $3,000?

A. No, that did not include the $3,000.

Following the April 24 meeting, all those in attendance except respondent proceeded to the Catawissa National Bank, where the $3,000 check which had been drawn to the order of Fenner was endorsed by him and delivered to Unangst, the cashier, and $3,000 in cash was received in exchange (R. 20-22, 105-107). Fenner took $500 "for the purpose of paying his income tax on the $3,000," and Michael and Reifsnyder took the remaining $2,500 (R. 107-108), which balance Michael and Reifsnyder subsequently delivered to the defendant Donald Johnson (R. 147-148).

9. Michael never accounted to the court for the receipt of the $3,000 which (less $500) he and Reifsnyder received from the Maxi Company, through Fenner as intermediary, and his "First and Final Account" as successor trustee, filed July 9, 1943, listed the Central Forging Company's "adjusted" accounts receivable, which he, as trustee, had conveyed to the Maxi Company pursuant to the reorganization plan, at the figure $20,534.50—the same value which he had falsely assigned to them in his report of April 15, 1942 (*supra*, p. 22) (R. 151-152). Michael further testified that Fenner had never been allowed any fee by the court and, in fact, had never been "officially connected" in any way

with the Central Forging Company reorganization proceeding (R. 152-153).

Respondent's defense at the trial.—In reversing respondent's conviction, the majority below in effect accepted the defense's version of the facts, and disregarded the evidence summarized above. In doing so, as we shall argue, *infra*, pp. 49-58, 71-73, the majority invaded the province of the jury, whose function it is to hear and weigh the evidence and determine where, in conflicting testimony, the truth lies, and thus exceeded their powers as a court sitting in appellate review of a conviction. But in view of the majority's decision, which we think cannot be sustained without accepting the defense's version of the facts and rejecting the Government's evidence, we deem it appropriate at this point to set forth in some detail the substance of respondent's defense, which the jury evidently found unconvincing, in order the more clearly to put in focus the opposing evidence, just reviewed, which the Government adduced, and which the jury must be taken to have believed.

Respondent's defense was founded upon his uncorroborated assertion that the final agreement between him, acting as attorney for the Maxi Company, and Michael and Reifsnyder, in their capacities as trustee and attorney for the trustee of the Central Forging Company, was that the Maxi Company was to pay—*not* $26,404.33 in consideration for the Central's net current assets (as Michael testi-

fied, *supra*, pp. 11-12, 14-15, 27-28), but rather—*the expenses of the reorganization proceeding* (which had not as yet been ascertained), whatever they might eventually prove to be, with the qualification that *$26,404.33 was to be the maximum for which Maxi would be liable in that regard* (R. 443-444, 462-464, 465, 466, 467, 468, 469, 471, 500-501). Respondent admitted that his original understanding with Michael and Reifsnyder was that $26,404.33 was to be paid by Maxi *in consideration for Central's net current assets* (R. 498), but insisted that this understanding was subsequently altered, orally, in a telephone conversation with Reifsnyder, to the agreement as just described, whereby $26,404.33 was to be merely a ceiling on Maxi's obligation to pay the administration costs (R. 500-501).

Respondent's explanation of now this modification of the original understanding came about was as follows: In the course of his negotiations with Reifsnyder concerning the provisions of the proposed plan of reorganization (see pp. 8-10, 11-12, 14-15, 17-21, *supra*), a point of issue which arose between them was, according to respondent, the date as of which the Maxi Company was to assume title to the Central Forging Company's assets; respondent desired the date to be January 1, 1942, whereas Reifsnyder desired it to be the date of consummation of the plan (R. 429-432, 436-444). The issue was raised, respondent testified, in a telephone conversation which he had with Reifsnyder shortly

after February 23, 1942, in which conversation the modification of the plan, whereby $26,404.33 would be a ceiling, was adopted as a compromise measure (R. 443, 436). Respondent quoted Reifsnyder as saying in this telephone conversation, "I have received your draft and most of the suggestions, or corrections, are all right but I cannot go along with this insert of January 1, '42, to transfer things [as] of that date. * * * we cannot go along with having this transfer made as of January 1st because it is just going to get us into a lot of trouble. * * * we'll make the other minor changes, which amount to nothing, and we'll arrange that you get everything just as was understood when the transfer comes, but the January 1st, getting things as of that date, we can't go with, *so what I want you to do is to stand by us and pay the administration costs of this proceeding up to the amount * * * that we had talked about*" [italics added] (R. 443-444). "After some conversation on that subject," respondent continued, "I said, 'Very well. Then if you leave this out the plan is to be, then, as you now have it, which is your old paragraph [*i.e.*, excluding reference to January 1, 1942, as the effective date of transfer of Central's assets to Maxi] *and we will pay the costs of the proceedings as long as they do not exceed $26,404.33*' * * * He said, 'All right, we will go along and file it if you will do that.' I said, 'That is what we will do' " [italics added] (R. 444). By mutual consent, respondent further tes-

tified, Reifsnyder caused the reorganization plan to be printed and filed in court in the form which Reifsnyder desired, *i.e.*, without the provision making January 1 the effective date of transfer, and also without incorporating the alleged compromise provision whereby $26,404.33 was to be merely a ceiling on Maxi's obligation to pay the administration costs rather than the full consideration for Central's net current assets (R. 444-445; see Ex. G-1-D, R. 704-708).

Respondent built his whole defense on this alleged oral modification of his original agreement with Reifsnyder in respect of the significance of the figure $26,404.33. Since, his position was, Judge Johnson's "Order on Fees and Allowances" of April 20, 1942 (*supra*, pp. 24-25) directed the payment of only $23,404.33 in the way of administration expenses, and since the Maxi Company paid that sum for that purpose, it fulfilled its obligation under the reorganization plan to the letter, and the $3,000 difference between $26,404.33 and $23,404.33, which Maxi paid in the form of the check to Fenner, was no part of the bankrupt estate of the Central Forging Company. The logic of respondent's position compelled him to make the claim that the $3,000 payment by the Maxi Company to Michael and Reifsnyder (through Fenner as intermediary) was in the nature of a gratuify to those individuals—a voluntary donation of money to which the estate of the Central Forging

Company had no claim (R. 468). His explanation of how he happened to consent to the making of this gift, and persuade the Maxi Company to make it, was as follows:

Michael and Reifsnyder, respondent testified, called at his office on April 8, 1942 (R. 462; compare Michael's version of what happened at this meeting, *supra*, pp. 14-16), and "as near as I can recollect it, Mr. Reifsnyder stated that he then knew approximately what the costs or allowances of administration expenses would be * * *; that they would be, as near as he could calculate, about $3,000 less than * * * the maximum amount which the Maxi Company promised to pay in the event that they went that high" (R. 463). Reifsnyder "made some calculations across the desk in my office," respondent continued, and stated that although he and Michael "should receive $7,500 [each] for their services," he was of the belief, as the result of a discussion on fees which he had had with special master Crolly, that "it would be necessary for both he and Mr. Michael to take less money for their fees than they had expected they would receive" (R. 463). Reifsnyder then went on to point out, respondent testified, that "he and Mr. Michael had done a good job in getting this thing closed promptly" and "had done a great deal of work to perfect this * * * in a very short time," and that "they ought to have some more money than they would be allowed

by the Court" (R. 464). Reifsnyder "stated quite frankly," continued respondent, "that if the costs as allowed would go up to $26,000 that the Maxi Company would be obliged to pay them up to that amount; if they didn't, we wouldn't be obliged to pay them, but they then would like to have this difference between what the costs would be and the maximum amount, * * * which would be about $3,000" (R. 464). "* * * why not give us the extra amount that you won't have to pay for costs?" respondent testified that Reifsnyder asked him (R. 465).

Among the reasons advanced by Reifsnyder why the Maxi Company should be willing to give him and Michael this "extra money," respondent further testified, was the fact that "he had made application for a commission in the Navy and that he might be called any time * * * and he would like to get as much money as possible to leave to his wife and children when he went," and the fact that Michael was "also of war age and he might be called and we are desirous of getting as much out of this as we can * * *" (R. 465). "Mr. Reifsnyder put up a very effective argument along the very lines which I have just indicated," respondent stated, and "it became so effective" that respondent agreed to discuss the matter with Davis, Maxi's treasurer (R. 466-467). After he had explained the situation to Davis, continued respondent, "Mr. Davis * * * thought

it would be all right * * * to go ahead with it" (R. 468).

It was at this point, respondent testified, that Reifsnyder first expressed the desire "to have that check * * * for the extra amount made to an outside party" (R. 469). When queried as to why he wanted the money paid in that way, Reifsnyder replied, according to respondent, that "we would just like to have it that way" (R. 469). Respondent testified that he then asked Reifsnyder to whom he wanted the check made out, and "They mentioned two or three * * * lawyers, one of whom was Donald Johnson" (R. 469). "My reply to that," respondent continued, "was that I didn't want a check made by my clients to Donald Johnson because he had nothing to do with this case, my clients didn't know him, he knew nothing about the case and didn't know there was such a case, why should that be done. I didn't approve of it" (R. 469-470). Reifsnyder then suggested Fenner as the intermediary, respondent stated, and inasmuch as Fenner was "a director of the Maxi Company," respondent told Reifsnyder that he had no objection to making out the check to him (R. 470).

"Then it was," respondent testified, "that Mr. Reifsnyder went into the question of reducing the receivables and suggested that he could have the receivables reduced and take some amount, $3,000 out of that," but respondent told Reifsnyder that

he could not "see any necessity" for doing that, as "that has nothing to do with what we are doing here, or talking about today" (R. 470). However, respondent admitted, he did say to Reifsnyder, "You could easily make any reduction in the receivables because we have to collect some of them, * * * and that's costing money so we won't come out quite so well in any event" (R. 471). Reifsnyder "seemed, or he did take that cue," respondent further testified, "and talk about a reduction in the receivables ended." Finally, respondent told Reifsnyder that he could not "see the necessity of this but write me a letter and explain it to me, I'll do what I can to get this so-called extra money for you, and I feel that will be all right" (R. 471).

Respondent admitted writing the letter to Davis (Ex. G-2-B, R. 700-702), which is quoted at pp. 18-19, *supra*, and receiving the letter from Reifsnyder (Ex. G-2-C, 702-704), which is quoted at pp. 20-21, *supra* (R. 475-476). He stated, however, that he never answered the letter from Reifsnyder because it "didn't concern me or the case from my standpoint" (R. 476). Respondent also admitted that he knew that the proceeds of the $3,000 check which the Maxi Company issued to Fenner was to be turned back by Fenner to Michael and Reifsnyder (R. 488-489).[18]

[18] Respondent's version of the facts, as we have summarized it, is taken from the transcript of his direct examination. See R. 495-576 for his testimony on cross-examination, and partic-

Respondent's prior contradictory testimony.—Approximately a year before the trial in the instant case, respondent testified in a contempt proceeding which had been brought against the same Michael who was the chief witness for the Government in this case (R. 507, 844). (This contempt proceeding culminated in this Court in the case of *In re Michael*, 326 U. S. 224.) His testimony dealt with the same transactions that are involved in the instant case, and the Government introduced in evidence and read to the jury in the present case the transcript of portions of his testimony in the contempt proceeding, the jury being instructed that respondent's earlier testimony was being received in evidence only as against him (R. 845).

Since respondent's testimony in the instant case—to the effect that the final agreement between himself and Reifsnyder was that the Maxi Company was merely required to pay the administrative costs of the reorganization proceeding, with $26,404.33 being fixed as a ceiling on that obligation, rather than (as originally proposed) to pay that sum of money outright, in consideration of Central's net current assets—was squarely contradicted by his testimony in the earlier proceeding, we quote excerpts from his earlier testimony,

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ularly R. 521-522 for his attempt to explain why, if the $3,000 was a gift, it was paid through an intermediary, and why he insisted that the intermediary be someone "on the inside" (like Fenner), rather than a stranger to the proceeding (like Donald Johnson).

as further proof of the falsity of his testimony in the present case.

Referring to what transpired at the meeting he had with Michael and Reifsnyder on April 8, 1942 (see pp. 35-38, *supra*, for his testimony concerning this meeting as given in the case at bar: and see pp. 14-16, *supra*, for Michael's testimony regarding this meeting), respondent testified at the earlier proceeding as follows:

> * * * It was then suggested, possibly by Mr. Reifsnyder, that the amount of the loose assets, inventory and so forth, would be in excess of the amount that would be required to pay the preferred claims, the fees, allowances, administration expenses, and so forth, and whether there couldn't be a separate check made for $3,000 and deducted from the amount of the loose stuff * * *. My answer to that was it made no difference to me as representing the purchaser how the money was paid, whether it was paid in one or more checks; we had agreed to pay a certain amount and we were willing to pay that certain amount and my only interest was to receive a proper deed, bill of sale, assignment of accounts, and so forth, vesting absolute title in my clients. As to anything else I wasn't particularly interested.
>
> A statement was then made they could deduct that $3,000 from the amount of the inventory as shown, in addition to some smaller amounts that had been deducted by agreement, * * * that they would deduct this

$3,000 from that and then give a check for $3,000 separate.

THE COURT: Mr. Knight, let me interrupt just a moment.

THE WITNESS: Certainly.

THE COURT: (continuing) To see if I fully understand this plan or scheme. The top price which your client was to offer was not altered by the plan in any way?

THE WITNESS: Was not what?

THE COURT: Was not altered.

THE WITNESS: That's right. (R. 856.)

* * * * * * *

THE COURT: The only thing that was altered was the manner of its payment, is that right?

THE WITNESS: Well, when you speak of plan do you speak of the plan that was filed in reorganization?

THE COURT: No, this scheme, we will call it.

THE WITNESS: Oh. Well, all right, let's designate it as a scheme.

THE COURT: These negotiations that preceded the plan of reorganization we will term a scheme, and your offer remained the same, as I understand.

THE WITNESS: Absolutely, absolutely.

THE COURT: But you were to pay the amount of the offer, less $3,000, into the debtor's estate, we will say, is that correct?

THE WITNESS: Give it to Mr. Michael as trustee, yes.

THE COURT: The assets were to then suffer by some manner in which you were not inter-

ested a proportionate reduction in value, appraised value?

THE WITNESS: That's right. (R. 858.)

* * * * * * *

THE COURT: But the payment was to be made in two checks?

THE WITNESS: That's right.

THE COURT: One, as you said, to be paid to Mr. Michael as the trustee and a second check in the amount of $3,000, is that right?

THE WITNESS: That is right. (R. 858.)

* * * * * * *

Q. Yes, what did you say to Mr. Michael and what did he say to you?

A. This was during the conversation about the $3,000 being separated and being paid in a separate check * * *. I remember saying to Mr. Michael—probably addressing it to both but in the end probably addressing it particularly to Mr. Michael—* * * I stated that it made no difference to me or to my clients how we paid the money as long as we were paying no more than the original amount, that my interest was to get the proper deed, bill of sale and assignments and so forth, and that was my purpose. * * * "You are under bond and an officer of the court——"

Q. Who was that addressed to? Mr. Michael?

A. That's right. They were both there to hear it but Mr. Reifsnyder was not under bond. (Continuing) "and it is your responsi-

bility what is done with the money, it isn't mine." (R. 867-868.)

* * * * * * *

Q. All right, on April 8th, then, you knew then that moneys were to go from your client's hands into the hands of a man who was not entitled to them, to-wit, one man named Fenner, did you know that, Mr. Knight?.

A. I knew it was proposed to do it that way. (R. 869.)

SUMMARY OF ARGUMENT

The Court of Appeals conceded that the "whole transaction," whereby the Maxi Company paid $3,000 to Michael and Reifsnyder through Fenner as intermediary, to which respondent was admittedly a party, was "highly reprehensible." It held, however, that it did not involve commission of the offense charged—fraudulent appropriation by the trustee of a bankrupt estate of property belonging to the estate—because it was "perfectly clear from the undisputed evidence" that only the Maxi Company had any interest in this $3,000, which was, therefore, a gift from Maxi to Michael and Reifsnyder. The decision is erroneous because it is founded on premises which are untenable in the light of the Government's evidence, which the court below was not at liberty to ignore.

A. 1. The fundamental premise of the majority opinion, from which all its conclusions flow, is the

assumption that the Maxi Company committed itself to pay (in addition to the $17,000 it paid in satisfaction of the claims of the creditors of the Central Forging Company bankrupt estate) merely the costs of administration of the reorganization proceeding in an amount not to exceed $26,404.33. But this basic premise is untenable in the light of the Government's evidence, which, under well-settled standards of appellate review, the Court of Appeals was bound to accept as true. For the Government proved by overwhelming evidence—including Michael's testimony, documentary evidence which supported it, and respondent's own admissions in a prior proceeding—that the Maxi Company agreed to pay the full amount of $26,404.33, which (plus the $17,000 aforesaid) was the consideration it paid for the entire assets of the bankrupt estate.

Only respondent's uncorroborated testimony at the trial, which was contradicted by his own testimony in the earlier *Michael* contempt proceeding, supports the premise on which the majority opinion rests. The plan of reorganization, as printed, filed, and approved, does not support respondent's testimony; but on the contrary contradicts it, and nothing in any order of Judge Johnson, who had charge of the proceeding, supports his testimony. The issuance by the Maxi Company of special checks covering certain of the reorganization expenses directly, as well as a blanket check to the order of the trustee covering all other expenses

as approved by the court, was merely a device to make it difficult to identify the $3,000 check simultaneously issued to Fenner (the proceeds of which, less $500 retained for tax purposes, concededly went to Michael and Reifsnyder) as part of the consideration which the Maxi Company was paying for the entire assets of the bankrupt estate.

2. Even if the formal plan of reorganization, as confirmed by Judge Johnson, could be construed to mean that the Maxi Company was required to pay only the costs of administration up to the limit of $26,404.33, Michael nevertheless clearly committed a fraud upon the bankrupt estate of the Central Forging Company. For the formal plan, so read, resulted from an organized scheme to defraud the estate of $3,000, and did not properly embody the agreement of Maxi to pay a full $26,404.33 for Central's current assets. So construed, both the order of confirmation and the order allowing fees were based both on a fraudulent and fictitious depreciation of the value of Central's net current assets and on a fraudulent failure to inform the bankruptcy court of Maxi's agreement to pay full value. But whatever the terms of the orders which the district judge was induced to make by the carefully devised scheme to cover up Michael's defalcation, the facts remain that Maxi had agreed to pay full value and that it kept its bargain. Consequently, Michael unlawfully transferred a portion of Central's accounts receivable without

turning over the consideration to the estate, and fraudulently appropriated that consideration, which rightfully belonged to the estate, to his own use.

3. Furthermore, even if it be thought, contrary to all the Government's evidence, that the Maxi Company actually agreed, as respondent claimed, to pay only the costs of administration up to a stated limit, and that therefore the $3,000 in cash which Michael received could not, technically, be deemed a part of the bankrupt estate, and hence not capable of being misappropriated by Michael, there is nevertheless no escape from the conclusion that Michael unlawfully transferred $3,000 worth of Central's accounts receivable to Maxi, which was the charge made in the second count of the indictment. For, if the $3,000 which Michael received was not in payment for $3,000 worth of Central's accounts receivable, Michael had no right to transfer the entire receivables to Maxi; he was justified in transferring only so much of the receivables as Maxi was paying for, *i.e.*, $3,000 less than the entire amount. And this is true notwithstanding the fact that the court's order of confirmation directed Michael to convey *all* Central's assets to Maxi, since that order was based upon and induced by Michael's false representation as to the value of the receivables, which misrepresentation was of the essence of the whole scheme to defraud.

B. 1. The majority's conclusion that no one other than the Maxi Company had any interest in the $3,000 paid to Michael and Reifsnyder through Fenner, and that it was therefore a gift, also assumes that neither the creditors of the bankrupt estate nor the claimants to administration expenses could have had any interest in this money. Even if this assumption were valid, however, the majority's conclusion overlooks the important point that a bankrupt estate is trust property, a distinct and separate res, corpus, or entirety, and that it is the integrity of the estate which Section 29(a) of the Bankruptcy Act was designed to protect.

2. But the assumption is invalid. Since the claimants to administration expenses would almost certainly have received more than they did if the existence of the concealed and diverted $3,000 had been made known to the court, they had a higher claim to this money than either the Maxi Company, which received full value in exchange therefor, or either of the two alleged "donees" of the money, Michael and Reifsnyder.

3. The creditors also had a higher claim to this money than those who plotted to plunder the estate, even though they had compromised their claims prior to consummation of the fraudulent scheme. They compromised their claims without knowledge of the fraudulent scheme whereby $3,000 of the available assets of the estate was to be diverted to il-

legitimate private uses. Consequently, they were entitled to revoke their acts of settlement and participate in the $3,000. Moreover, certain of the creditors, whose claims totalled more than $3,000, never did agree to the reorganization plan. *A fortiori*, these dissenting creditors had a higher claim to the concealed money than those who conspired to embezzle it from the estate.

C. Respondent's claim, which the majority accepted, that the $3,000 payment to Michael and Reifsnyder, through Fenner, was a gift on the part of the Maxi Company—a claim which he was forced to make in view of his denial that that money was part of the consideration paid for the assets of the bankrupt estate—was unbelievable. To accept such a claim, it is necessary to reject entirely the evidence adduced by the Government, and give credence to an implausible tale which the jury obviously did not believe. The established facts—which were not denied—that the money was paid through an intermediary, who was required to be some one "on the inside," and who would pay a tax on it, and that the accounts receivable of the bankrupt estate, which were conveyed to the Maxi Company, were arbitrarily and secretly reduced in value in Michael's report to the court, simply cannot be explained on the theory that the payment of the $3,000 was a gift.

ARGUMENT

The Government's evidence fully supported the charges in the indictment that Michael, as trustee of the bankrupt estate, fraudulently appropriated to his own use $3,000 belonging to the estate and unlawfully transferred $3,000 of accounts receivable belonging to the estate, and that respondent conspired with and abetted him in doing so. The judgment below, reversing respondent's conviction on the ground that the evidence failed to support the indictment charges, should therefore be reversed.

The majority of the Court of Appeals conceded in their opinion that the "whole transaction," whereby the Maxi Company paid $3,000 to Michael and Reifsnyder through Fenner as intermediary, to which transaction respondent was admittedly a party, "was highly reprehensible" and "may well have involved the commission of a criminal offense" (R. 835), but held that the offense was not that of fraudulent appropriation by the trustee of a bankrupt estate of property belonging to the estate to his own use, as charged in the indictment. The majority correctly pointed out that the indictment was "based upon the premise that the sum of $3,000 which Michael received in the manner described belonged to the estate of the Forging Company," but ruled that the evidence did not support this "basic premise" because it was "perfectly clear from the undisputed evidence that no one other than the Maxi Company had any interest in the $3,000 which it paid to Michael through Fenner," with the result that the payment of the "additional $3,000 was a purely voluntary payment out

of its own funds of a sum upon which the estate of the Forging Company had no claim" (R. 835).

We submit that the lower court plainly erred in holding that the "undisputed evidence" showed that only the Maxi Company had any interest in the $3,000 in question; that the estate of the Central Forging Company had no claim to that money; that the payment of the money to Michael and Reifsnyder, through what the majority conceded were "devious means" (R. 835), was a mere gratuity on Maxi's part; and consequently that there was no violation of Section 29(a) of the Bankruptcy Act (*supra*, pp. 2-3).

A. *The Government's evidence overwhelmingly proved that the Maxi Company was committed to pay $26,404.33 for the Central Forging Company's net current assets; the basic premise of the majority below, that Maxi was merely to pay the administrative expenses not in excess of $26,404.33, is supported only by respondent's uncorroborated testimony to that effect.*—1. Analysis of the majority opinion reveals that its basic premise, from which all its conclusions flow, is the assumption that the Maxi Company was merely committed to pay the administrative expenses of the reorganization proceeding in an amount not to exceed $26,404.33.[19] The opinion, moreover, apparently ac-

[19] In addition, of course, to the $17,000 in cash which it paid for Central's fixed assets and which it placed in escrow for the purpose of redeeming its (Maxi's) bonds that were issued to the creditors of Central on the percentage basis explained in the Statement, *supra*, pp. 8, 11, 13; cf. pp. 21, 26.

cepts this premise as an undisputed fact,[20] though one paragraph contains a curious and unexplainable inconsistency: After conceding, in the first sentence of the paragraph that "There was evidence which would support a finding that the Maxi Company obligated itself *to pay $26,404.33*, in addition to the $17,000 to which it was committed by the issuance of its debenture bonds in that amount to

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[20] Thus the opinion states: "Under this plan [of reorganization] the Maxi Company acquired all the assets of the Forging Company, paid its secured creditors 20% and its unsecured creditors 5% of their claims in bonds subsequently paid off in cash *and paid all the expenses of the reorganization proceeding and of a preceding receivership in the state court*" (R. 830). "Under the plan the stockholders of the Forging Company were to receive nothing and the fees and expenses of the prior receivership in the state court and of the reorganization proceeding in the district court were to be paid in cash by the trustee. The trustee at the time did not have funds in his possession for this purpose and the plan did not specify the source from which he was to obtain the necessary funds. It is perfectly clear from the evidence, however, that it was understood by everyone that these funds were to come from the Maxi Company *and it is equally clear that the Maxi Company's liability to pay to the trustee the moneys required by him for this purpose was limited to $26,404.33*, which was the amount on December 31, 1941, as shown by the accountant's report, of the net current assets of the Forging Company which the Maxi Company was to receive" (R. 833): "The Maxi Company was entitled to all of the assets of the Forging Company *and its only other obligation was to pay the expenses as allowed by the court*. This obligation it fulfilled to the letter" (R. 835). *"But since the court did not in fact make allowances in excess of $23,404.33, the Maxi Company's obligation under the plan to pay the expenses was limited to that amount* * * *" (R. 835). "The sole consideration under the plan which the Maxi Company was obligated to pay for all of the assets of the Forging Company which it received, including the accounts receivable, was the issuance by it to the creditors of the Forging Company of its debenture bonds in the sum of $17,000 *and its payment of the expenses of administration as allowed by the district court*" (R. 836). [All italics added.]

the Forging Company's creditors,"—this being the Government's contention and the very heart of its case—the majority went on to contradict themselves in the very same paragraph of the opinion, by saying that "The necessary conclusion, therefore, is that the Maxi Company's obligation under the plan was to pay $17,000 through its debenture bonds to the Forging Company's creditors and in addition to pay *the expenses of the receivership and reorganization proceedings,* as allowed by the District Court, *to an amount not exceeding $26,404.33*" [italics added] (R. 833).

But this fundamental premise of the majority opinion, far from being undisputed, was the most disputed issue at the trial. Not only did the Government dispute the proposition which the majority below seem to accept as unquestioned, but it demonstrated its contention to the contrary —*i.e.*, that the Maxi Company agreed to pay to the Central Forging Company estate the full amount of $26,404.33 (in addition to the $17,000 for redemption of its bonds)—by an overwhelming mass of evidence, including Michael's candid and self-incriminating testimony concerning the whole scheme to which he and Reifsnyder and respondent were parties (*supra,* pp. 8-17), the tell-tale documentary evidence in the form of respondent's letter to Davis and Reifsnyder's letter to respondent of April 9, 1942, which fully corroborated Michael's testimony (*supra,* pp. 17-21), and, not least in im-

pertance, respondent's own prior contradictory testimony in the *Michael* contempt proceeding, which we have set forth at some length in the Statement, *supra*, pp. 40-43. Furthermore, the majority's basic premise is supported only by respondent's own uncorroborated testimony to the effect that his original understanding with Michael and Reifsnyder—that the Maxi Company would pay $26,404.33 *for Central's net current assets*—was subsequently changed, in a telephone conversation with Reifsnyder, to the alleged agreement whereunder Maxi would pay only the expenses of the reorganization up to $26,404.33. It was this uncorroborated claim of respondent's upon which, as we have seen, he built his entire defense. But, as we pointed out in the Statement (*supra*, pp. 33-34), this alleged modification of the plan of reorganization was never incorporated into the written or printed plan and was never submitted to the court. It is perfectly clear that the jury simply did not believe respondent's testimony in regard to this alleged change in the plan of reorganization. And the jury's disbelief was obviously justified, not only in view of Michael's directly contrary testimony, the documentary evidence which supported Michael, and respondent's own prior contradictory testimony with which the Government confronted him, but also by the preposterousness of respondent's claim that the $3,000 paid by Maxi to Michael and Reifsnyder, through Fenner as a dummy

intermediary, was a gift (see point C, *infra*, pp. 71-73)—a claim which the logic of respondent's position compelled him to make.

Certainly nothing in any of Judge Johnson's orders supports respondent's claim, accepted by the majority below, that the Maxi Company's obligation under the plan of reorganization, as promulgated, was merely to pay the costs of administration. His order of April 17, 1942, confirming the reorganization plan, directed the trustee to convey the Central Forging Company's entire assets to the Maxi Company "upon the payment of all administration costs and expenses as [may be hereafter] allowed by this Court, within the limits of the funds as set forth in the Trustee's report filed April 15, 1942" (*supra*, pp. 22-23). But there is clearly nothing in that provision of the order which suggests that the Maxi Company was to pay those costs, though, as purchaser of the debtor's assets, it would be the initial source of the necessary funds. True, the order did not expressly state that the trustee was to pay the costs.[21] But the clear implication, both of the April 17 order and the March 16 order (see footnote 21),

[21] Judge Johnson's order of March 16, 1942, tentatively approving the proposed plan of reorganization as "fair, equitable and feasible" and directing that it be submitted to creditors and other parties in interest for consideration and approval, was similarly inexplicit in regard to who was to pay the administration expenses. The order provided in this respect merely that "Administration costs and expenses and Columbia County Equity Court costs and fees are to be paid hereunder" (*supra*, p. 14).

was that the trustee was to pay the costs from whatever funds were available to him. Payment of the costs of administration of a bankruptcy or reorganization proceeding is, of course, one of the normal, routine functions of the trustee in bankruptcy (see 11 U. S. C. 75(a); 2 Remington on Bankruptcy, 4th ed., § 1131; 2 Collier on Bankruptcy, 14th ed., § 47.11; 6 *id.*, § 8.05; 9 *id.*, § 29.09), and it would be surprising to suggest, under ordinary circumstances and in the absence of any express provision in the plan of reorganization to such effect, that any one other than the trustee should discharge this function. But it is unnecessary to speculate on the matter. For it is plain from the express terms of the plan of reorganization filed by the trustee on February 27, 1942, which the court's order of April 17 confirmed, who it was that was to pay the administration costs. That plan explicitly provided that all "Fees and Expenses of Receivership in the Equity Court of Columbia County, Pennsylvania, as allowed and approved by the United States District Court for the Middle District of Pennsylvania" and "All Taxes, Costs and Expenses of Reorganization and Administration as allowed by the United States [District] Court for the Middle District of Pennsylvania, as well as all expenses of consummating this plan of reorganization" "shall be paid in full in cash by the Trustee aforesaid upon acceptance of the plan according to law" (*supra*, p. 13).

It is true that the Maxi Company did pay some of the administration expenses directly, in the sense that it issued three special checks covering respondent's, Unangst's, and Michael's and Reifsnyder's fees and allowances in addition to the check which it issued to "Robt. D. Michael, Trustee" and which was in an amount just sufficient to pay all the remaining expenses (*supra*, pp. 26-28). But the net effect of this was precisely the same as though Maxi issued a single check to Michael, as trustee, and Michael used the proceeds to pay all the administration expenses himself in his capacity as trustee. The multiplicity of checks was undoubtedly for the purpose of making it difficult to identify the $3,000 Fenner check, which Maxi issued along with the others, as part of the consideration for Central's net current assets. Michael's testimony in this connection is extremely significant. It will be recalled that he testified that he expected and understood that Maxi would issue —in addition, of course, to the $3,000 Fenner check —a single check to him as trustee, with which he "would make disbursements in accordance with orders of the court;" that respondent, however, "had the idea that it should be paid over in several checks"; and that Reifsnyder, after first objecting, finally agreed to go along with respondent's proposal, which was accordingly adopted (see pp. 28-30, *supra*).

To summarize, the Government contended at the trial, and established by a wealth of evidence

of the most convincing character, that (a) the Maxi Company committed itself under the reorganization plan to pay to the Central Forging Company estate the full amount of $26,404.33 (in addition to the $17,000 that was placed in escrow for payment to Central's creditors); (b) $23,404.33 of that amount was properly used by Michael, as custodian of the Central estate, to pay the administration costs as ordered by the court; (c) the other $3,000, which was part and parcel of the consideration which the Maxi Company agreed to pay, and did pay, for the net current assets of Central to which Maxi took title under the plan, and which Michael was duty bound to receive and account for as part of the bankrupt estate of which he was the duly appointed custodian, was diverted and appropriated by Michael to his own personal use, in defalcation of his trust, with respondent's full knowledge and acquiescence: and (d) there was, consequently, a plainly fraudulent appropriation by Michael, abetted by respondent, of part of the bankrupt estate, as specifically proscribed by Section 29(á) of the Bankruptcy Act and charged in the indictment. The majority below, by ignoring the Government's evidence, and accepting as true respondent's uncorroborated testimony—testimony that was self-contradicted as well as contradicted by the testimony and documentary evidence adduced by the Government—to the effect that Maxi's only agreement was

to pay the costs of administration up to $26,404.33, upon which proposition respondent's entire defense and every conclusion of the majority below were necessarily predicated, exceeded their powers as a court sitting in appellate review of a conviction. For it is well settled that "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *United States*, 315 U. S. 60, 80; see also *Kotteakos* v. *United States*, 328 U. S. 750, 763-764; *Burton* v. *United States*, 202 U. S. 344, 373.

2. We think, as we have said (*supra*, pp. 54-55), that the formal plan of reorganization confirmed by Judge Johnson required the Maxi Company to pay $26,404.33 to the debtor's estate, and did not merely oblige it to pay the costs of administration up to the limit of $26,404.33. But even if the formal plan be thought to embody only the latter requirement, we submit that Michael clearly committed a fraud upon the bankrupt estate of the Central Forging Company in violation of Section 29 (a). For the formal plan—if it be read in the limited fashion respondent urges—resulted from an organized scheme to defraud the estate of $3,000, and did not properly embody the agreement of Maxi to pay a full $26,404.33 for Central's current assets. So construed, both the order of confirmation and the order allowing fees were based on a fraudulent and fictitious depreciation of the value of Central's net cur-

rent assets as well as on a fraudulent failure to inform the bankruptcy court of Maxi's agreement to pay full value. But whatever the terms of the orders which the district judge was induced to make by this carefully devised scheme to cover up Michael's defalcation, the facts remain that Maxi had agreed to pay full value and that it kept its bargain. The necessary consequence was that, upon the working out of the scheme, Michael unlawfully transferred a portion of Central's accounts receivable without turning over the consideration to the estate, and fraudulently appropriated that consideration, which rightfully belonged to the estate, to his own use.

Section 29 (a) was designed to protect all funds or other property coming into the hands or control of the trustee because of his official relation to the bankrupt or debtor, and to preserve the integrity of that property, which constitutes the "estate of a bankrupt" for the purposes of the section. It makes no difference that the person turning over money or property to the trustee is not acting under court order or even pursuant to an enforceable agreement. If money is *in fact* being paid for the bankrupt's assets, that money constructively forms a part of the bankrupt's estate, whether or not the trustee treats it as such in his dealings and accounts. He cannot lawfully appropriate it to his own use in any way, regardless of the surface appearance the parties may give

to the transaction by which the funds come into his hands.

In this case, the Maxi Company had agreed to pay $26,404.33 to the trustee of the bankrupt estate of the Central Forging Company in consideration for current assets of the estate which were in fact worth that much and which Maxi in fact received. And the Maxi Company did actually pay $26,404.33 for those assets (the $3,000 Fenner check constituting an integral part of the consideration, according to the overwhelming evidence adduced by the prosecution). The trustee, Michael, was therefore bound under his oath as an officer of the court, and in his custodial capacity as trustee, to treat the entire $26,404.33 which he received for those assets as part of the bankrupt estate and to account to the court therefor. It is quite irrelevant that the court directed the disbursement of only $23,404.33 of this money as administration expenses, or that it may have formally limited Maxi's obligation to the payment of costs up to a stated maximum—even apart from the significant fact that the court order was based upon a fraudulent misrepresentation of the value of Central's net current assets and the corresponding amount of cash which the estate was to receive for those assets. The important facts were that, as the jury found, the bankrupt estate was worth $3,000 more than Michael reported to the court, that Michael conveyed the entire estate to the Maxi Company, and that he received its full value in cash in ex-

change (including, as we said, the $3,000 Fenner money). According to Michael's testimony, to the documentary evidence corroborating it, and to respondent's own prior testimony in the *Michael* contempt proceeding, that $3,000 was considered by Michael, Reifsnyder, respondent, and in fact by everyone concerned with the transaction, as part of the consideration for the Central Forging Company's assets. It therefore plainly became part of the bankrupt estate and was required to be treated as such; and Michael's appropriation of it to his own ends was a manifest defalcation, in violation of his trust, as he himself admitted both by his plea of guilty and his testimony at the trial.

3. Moreover, even if it be held, contrary to all the Government's evidence, that the Maxi Company actually agreed, as respondent claimed, to pay only the costs of administration up to a stated limit, and that therefore the $3,000 in cash which Michael received through Fenner could not, technically, be deemed a part of the bankrupt estate, and hence not capable of being misappropriated by Michael, we submit, nevertheless, that there is no escape from the conclusion that Michael *unlawfully transferred $3,000 worth of accounts receivable of the Central Forging Company to the Maxi Company,* which was the charge made in the second count of the indictment.[22] For, if the $3,000

[22] Counts 1 and 2 of the indictment seem to have been drawn on alternate theories. The theory of count 1 was that Michael's transfer of Central's entire accounts receivable to

which Michael received from the Maxi Company, through Fenner, was not in payment for $3,000 worth of Central's accounts receivable, Michael had no right to transfer the entire accounts receivable of Central to the Maxi Company; he was justified in transferring only so much of the accounts receivable as the Maxi Company was paying for, namely, $3,000 less than the entire amount. True, Judge Johnson's order of April 17, 1942, confirming the plan of reorganization, directed Michael to convey to the Maxi Company *all* the assets of the Central Forging Company (*supra*, p. 23). But this order, as we pointed out above, was based on Michael's false representation to the court that the Central Forging Company's accounts receivable were worth only $20,534.50, or $3,000 less than they were actually worth, a false representation which was of the essence of the whole scheme to defraud. Judge Johnson's order to convey the entire accounts receivable was, in other words, induced by Michael's false and fraudulent representation as to their value. Therefore, every equitable consideration demands that, in determin-

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the Maxi Company was proper, and that his offense lay in misappropriating the $3,000 in cash which he received, through Fenner, as partial consideration for the receivables. The theory of count 2 was that Michael's offense consisted of transferring $3,000 of the accounts receivable, without depositing any consideration therefor in the bankrupt's funds, in violation of his trust. (R. 7-12.) Since respondent's sentence—payment of a fine of $1,000—was a general sentence, imposed on all three counts of the indictment, this case presents no question as to whether counts 1 and 2 could support separate sentences, cumulatively imposed. Cf. *Pinkerton* v. *United States*, 328 U. S. 640, 641-642, fn. 1.

ing whether Michael, in transferring Central's entire accounts receivable to the Maxi Company, did so lawfully or unlawfully (this being the issue posed by the second count of the indictment), Judge Johnson's fraudulently induced order to convey the entire accounts receivable should be considered as though it directed the conveyance of only so much of the receivables as he was misled into believing existed. Cf. *infra*, pp. 69-70.

B. The $3,000 which Michael received in exchange for assets of the bankrupt estate of equivalent value was part of the bankrupt estate and Michael was duty bound to treat it as such; his appropriation of the money to his own use was, therefore, a breach of trust which the Bankruptcy Act specifically proscribes.—The court below reasoned that "Under the plan of reorganization, * * * the sole rights of the creditors were to receive the debenture bonds which the Maxi Company issued and which were delivered to them. The stockholders had no rights whatever. The Maxi Company was entitled to all of the assets of the Forging Company and its only other obligation was to pay the expenses as allowed by the court. This obligation it fulfilled to the letter," and that therefore "it is perfectly clear from the undisputed evidence that no one other than the Maxi Company had any interest in the $3,000 which it paid to Michael through Fenner" (R. 835).

We have pointed out under point A, 1, *supra*, pp. 50-61, the error of that part of the above quotation which states that the Maxi Company's "only other obligation was to pay the expenses as allowed by the court," and the fact that when that basic premise is removed the entire rationale of the majority's opinion collapses. Here, we would point out that, even apart from that infirmity, the majority opinion is untenable in declaring that no one other than Maxi had any interest in the $3,000 which it paid to Michael.

1. Assuming, *arguendo*, that the majority are correct in saying that the creditors of the Central Forging Company could have had no conceivable interest in the $3,000 paid to Michael and Reifsnyder through Fenner, because they were irrevocably bound by their agreement to accept, in satisfaction of their claims against the Central estate, certain fixed percentages of those claims in debenture bonds of the Maxi Company, it does not follow that "no one other than the Maxi Company had any interest in" this money.

In the first place, this argument, as the dissenting judge pointed out, overlooks entirely the vital point that a bankrupt estate is "trust property," a "distinct and separate res, corpus or entirety," a "dynamic unit with established content," and that it is "the integrity of the estate which Section 29(a) was designed to protect" (R. 837). Cf. *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S.

300, 307; *In re Biro*, 107 F. 2d 386, 387-388 (C. A. 2); *Meagher* v. *United States*, 36 F. 2d 156, 158 (C. A. 9). This fact is amply demonstrated by the numerous provisions of the Bankruptcy Act, as pointed out by the dissenting judge (R. 837, note 2), concerning such varied aspects of bankruptcy procedure as preserving *the estate*, collecting *the estate*, closing *the estate*, reopening *the estate*, etc. As we have shown (*supra*, pp. 50-61), Michael should have accounted for the $3,000 as part of the bankrupt estate, and his use of the money constituted a misappropriation of estate funds. The majority's view that the stockholders' and creditors' rights had become fixed before the scheme to obtain the $3,000 of "extra money" was finally consummated, and that therefore they could have no interest in the money, misses the point that it was *the estate* that was defrauded, and that the question of whether it was the stockholders, the creditors, or the claimants to the administration expenses who suffered from the fraud is of no moment.

2. Furthermore,—and without intending to detract in any way from the force of the foregoing argument—it is pertinent to point out that, since Judge Johnson utilized to the last penny the entire $23,404.33 which he was misled (we must presume) into believing was all there was available for the payment of administration expenses, it is obviously unrealistic to ignore the probability that some, at least, of the innocent beneficiaries of the order al-

lowing fees (see footnote 13, *supra*, p. 24) would have been granted greater allowances if the existence of the concealed $3,000 had been made known to the court. They, certainly, had a higher claim to the $3,000 than the Maxi Company, *which received full value in exchange for that money.* Consequently, the majority's view that "no one other than the Maxi Company had any interest in" the $3,000, and the necessary corollary to that view—that the payment of that money was a gift on Maxi's part (of which we shall say more under point C, *infra*)—is unsupportable under any hypothesis.

3. What we have said so far has been on the assumption, *arguendo,* that the creditors of the Central Forging Company could have had no conceivable interest in the $3,000 in question. We do not concede, however, that the creditors had no interest in that money. True, they—or most of them, see *infra,* pp. 68-69 had accepted the reorganization plan (which gave secured creditors 20%, and unsecured creditors 5%, of their claims in debenture bonds of the Maxi Company) before the fraud involving the $3,000 was consummated. But, clearly, though their acceptance of the plan of reorganization was undoubtedly irrevocable for all ordinary purposes, it shocks the conscience to suggest that their acceptance of that plan, without knowledge of the fraudulent scheme whereby $3,000 of the estate was to be concealed and diverted to private

ends, placed them in a less advantageous position as claimants of this money, upon their discovering the scheme, than the plunderers of the estate and their abettors.

The closing of an estate, and the settlement of rights and claims in respect thereof, is never an irrevocable and irreversible act where fraud has attended it. See 11 U. S. C. 11(a)(8) and (12), and cf. 11 U. S. C. 786; see also 6 Collier on Bankruptcy, 14th ed., §§ 7.38, 7.39, 11.04, 11.05, 11.06, 11.08, 11.21.[23] Plainly, if assets of a bankrupt, unknown at the time of the adjudication fixing the rights of parties in interest, are subsequently discovered, the mere fact that rights had "become fixed and established" before the existence of such assets became known would be no impediment to a just and equitable distribution of the newly-discovered assets to proper claimants. *Burton Coal Co.* v. *Franklin Coal Co.*, 67 F. 2d 796, 799 (C. A. 8); *Williams* v. *Rice*, 30 F. 2d 814 (C. A. 5); *In re Schreiber*, 23 F. 2d 428 (C. A. 2), certiorari denied

[23] Compare the closing paragraph of Judge Johnson's order of April 17, 1942 (confirming the reorganization plan, directing the cancellation of all stock and the original bonds of the Central Forging Company, etc.): "The Trustee is authorized to apply to this Court for such additional orders or relief as shall be found to be necessary in aid of consummating this revised plan of reorganization approved and confirmed herein" (*supra*, p. 23). Under that provision, the trustee was authorized to ask the court for any order which the interests of justice might have dictated, and the fact that the creditors had, previously, formally compromised their claims by acquiescing in the reorganization plan would not have been a bar to revocation and cancellation of their previous waiver of rights if justice demanded that such be done.

sub nom. Schreiber v. *Public National Bank & Trust Company of New York*, 277 U. S. 593; *In re Graff*, 255 Fed. 241 (C. A. 2); 1 Collier on Bankruptcy, 14th ed., §§ 2.49, 2.50; 6 Remington on Bankruptcy, 4th ed., §§ 2971 *et seq.* Assets fraudulently concealed and diverted to illegitimate uses stand in no different posture. *Gerber* v. *Fruchter*, 147 F. 2d 120 (C. A. 2); *Doyle* v. *Ponsford*, 136 F. 2d 401 (C. A. 8); *In re Leigh*, 272 Fed. 678 (C. A. 7), certiorari denied *sub nom. Chicago Railway Equipment Co.* v. *Laughlin*, 256 U. S. 698; *In re Graff*, 250 Fed. 997, 999-1000 (C. A. 2); *In re Goldman*, 129 Fed. 212 (C. A. 2); *In re Krieg*, 37 F. Supp. 559 (E. D. Pa.); *Chappel* v. *First Trust Co. of Appleton, Wis.*, 30 F. Supp. 765 (E. D. Wis.); *In re Sanders*, 20 F. Supp. 98, 101 (N. D. Ga.); cf. *In re Frank*, 278 Fed. 390 (D. Mont.).

It will be recalled, moreover, that not all of the creditors of the Central Forging Company acquiesced in the plan of reorganization as finally confirmed (though more than the two-thirds required under the law to put the plan into effect did consent thereto), and that the claims of the dissenting creditors, bondholders, totalled well in excess of $3,000 (*supra*, p. 22). Whatever view might be entertained in respect of the rights of those creditors who, ignorant of the conspiracy that was afoot, consented to the plan of reorganization as proposed, can it be doubted that a court

of equity [24] would recognize the priority of at least the *dissenting* creditors' claims to the $3,000 over any supposed claim to the money on the part of those who, by the "devious" and "reprehensible" means conceded by the majority to have been used (R. 835), schemed to defraud the estate by just that amount and deliver it to Michael, who "was not entitled [to it] under the plan or order of the court granting him allowances as trustee" (*ibid.*)?

What this Court said, in a different factual setting, in *American Ins. Co.* v. *Avon Park*, 311 U. S. 138, 145-146, is also pertinent in this case:

> * * * "A bankruptcy court is a court of equity * * * and is guided by equitable doctrines and principles except in so far as they are inconsistent with the [Bankruptcy] Act. * * *" * * * These principles are a part of the control which the court has over the whole process of formulation and approval of plans of composition or reorganization, and the obtaining of assents thereto. * * * The responsibility of the court entails scrutiny of the circumstances surrounding the acceptances, the special or ulterior motives which may have induced them, the time of acquiring the claims

[24] As this Court has had frequent occasion to point out, courts of bankruptcy are essentially courts of equity and their proceedings are governed by equitable principles. *United States Bank* v. *Chase Bank*, 331 U. S. 28, 36; *Heiser* v. *Woodruff*, 327 U. S. 726, 732-733; *Young* v. *Higbee Co.*, 324 U. S. 204, 214; *Pfister* v. *Finance Corp.*, 317 U. S. 144, 152; *Prudence Corp.* v. *Geist*, 316 U. S. 89, 95; *American Ins. Co.* v. *Avon Park*, 311 U. S. 138, 145; *Securities Commission* v. *U. S. Realty Co.*, 310 U. S. 434, 455; *Pepper* v. *Litton*, 308 U. S. 295, 304; *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 240.

> so voting, the amount paid therefor, and the like. * * * Only after such investigation can the court exercise the "informed, independent judgment" * * * which is an essential prerequisite for confirmation of a plan. * * * Where such investigation discloses the existence of unfair dealing, a breach of fiduciary obligations, profiting from a trust, special benefits for the reorganizers, or the need for protection of investors against an inside few, or of one class of investors from the encroachments of another, the court has ample power to adjust the remedy to the need. * * * That power [of a court of bankruptcy] is ample for the exigencies of varying situations. It is not dependent on express statutory provisions. It inheres in the jurisdiction of a court of bankruptcy. The necessity for its exercise * * * is based on the responsibility of the court before entering an order of confirmation to be satisfied that the plan in its practical incidence embodies a fair and equitable bargain openly arrived at and devoid of overreaching, however subtle. * * *

We submit that the broad equity powers of a court of bankruptcy, thus affirmed by this Court, refute the position, implicit in the majority opinion, that, merely because the creditors of the bankrupt Central Forging Company (and indeed not all, as we have pointed out), unaware of the plot to divert part of the available assets of the estate to fraudulent private uses, compromised their claims and accepted in good faith the plan

of reorganization proposed to them, they were forever precluded from revoking their waiver of rights and asserting claim to the diverted funds upon discovery of the true facts.

It is not necessary, for the purposes of this case, to determine, as among the stockholders, the creditors, and the good-faith claimants to administration expenses, which of those groups had the highest claim to the $3,000 of the bankrupt estate which Michael, Reifsnyder, Fenner and respondent conspired to divert to forbidden uses. It is sufficient to show that that money unquestionably belonged to the bankrupt estate—to be equitably distributed among proper claimants according to accepted rules of bankruptcy law—and that the majority's conclusions that "no one other than the Maxi Company had any interest in the $3,000," which was consequently a gift on its part to Michael and Reifsnyder, simply cannot be sustained in the light of the Government's evidence.

C. *Respondent's claim at the trial, which the logic of his position forced him to make, and which the majority below found no escape from accepting in view of their untenable theory of the case,—that the $3,000 payment to Michael and Reifsnyder through Fenner as intermediary was a gift on the part of the Maxi Company—was unbelievable.*—Impelled by the logic of their theory of the case, which, as we have sought to show, was utterly untenable in the light of the Government's evi-

dence, the majority below were forced to conclude that the Maxi Company's "payment to Michael through Fenner of an additional $3,000 was a purely voluntary payment out of its own funds of a sum upon which the estate of the Forging Company had no claim" (R. 835). The majority thus accepted respondent's testimony at the trial to that effect, he, too, having asserted that the $3,000 was a mere gratuity on Maxi's part.

But this conclusion of the majority simply does not accord with the facts in the case. Business concerns just do not make gifts in this fashion to individuals. Nor did the Maxi Company do so here, unless Michael's candid, consistent, believable, and document-supported testimony is entirely rejected, and respondent's uncorroborated, interested, previously self-contradicted (*supra*, pp. 39-43), and inherently incredible version of the $3,000 payment (*supra*, pp. 35-38) is accepted. The view that the $3,000 payment was a gratuity to Michael and Reifsnyder—because they "had done a good job" and "a great deal of work," because they were entitled to "more money than they would be allowed by the Court," because they might soon go into the service and needed "as much money as possible to leave" to their families, and the other "very effective" arguments they "put up" along those lines (*supra*, pp. 35-37)—ignores the overwhelming evidence adduced by the Government that the entire assets of the Central Forging Company were trans-

ferred to the Maxi Company for a consideration based upon a previously agreed and carefully calculated dollars-and-cents valuation, and that of this consideration and valuation the amount of $3,000 was deducted, arbitrarily and secretly, and never credited to the funds of the bankrupt estate or made known to the court. Under the theory that the $3,000 was a gift, it is simply not possible to explain why it was felt necessary to pay it through an intermediary, who had to be some one who was not a stranger to the reorganization proceeding, like Donald Johnson, but rather some one "on the inside," like Fenner, and who would retain just enough of the money to enable him to pay the income tax on it and turn the balance over to the ultimate recipients. And it is equally impossible, under the "gift" theory, to explain the elaborately schemed falsification by Michael, in his report to the court, of the value of Central's accounts receivable and net current assets, which the dissenting judge below properly described as "the arbitrary, unjustified and unexplained $3,000 reduction" in the accounts receivable and net assets of the bankrupt estate (R. 837).

CONCLUSION

The decision below is erroneous and defeats the manifest purpose of Section 29(a) of the Bankruptcy Act. It holds that that section does not apply where a trustee in bankruptcy, in collusion with the purchaser of the bankrupt's assets in what purports to be a plan of reorganization, schemes to

mislead the court by a fictitious depreciation of the estate, which scheme, when approved by the court, provides the trustee and his co-conspirators with a surplus of funds not known to the court, which they then may divide and distribute among themselves without an accounting to any one. It establishes a facile means of embezzling from bankrupt estates with impunity, in plain violation of the statutory proscription. Moreover, the decision and the premises on which it rests ignore the Government's evidence, which the jury accepted in reaching their verdict of guilty, and accept as true the evidence and theory of the defense—an obvious departure from the legitimate limits of appellate review. It is therefore respectfully submitted that the judgment below should be reversed.

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